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November 4, 2002

Office of the Secretary
Federal Communications Commission
Room TW-A325
12th Street SW
Washington, DC 20554

Re: Notice of Proposed Rulemaking - Update to the Telephone Consumer Protection Act of 1991; CG Docket Number 02-278 and CC Docket Number 92-90, FCC 02-250

Ladies and Gentlemen

This letter is in response to the Commission's request for public comments regarding its review of the Telephone Consumer Protection Act of 1991 ("TCPA"), as set forth in the Notice of Proposed Rulemaking ("NPRM") dated October 8, 2002.

The American Resort Development Association ("ARDA") is the Washington, D.C. based trade association representing the vacation ownership industry. Established in 1969, ARDA today has over 800 members, ranging from small, privately held firms to publicly traded companies and international corporations. ARDA's diverse membership includes companies with vacation timeshare resorts, private residence clubs, land development, lots sales, second homes and resort communities. However, the majority of ARDA's membership is related to the timeshare industry

Recently, ARDA submitted comments and participated in a public forum conducted by the Federal Trade Commission concerning the FTC's proposed modification of the Telemarketing Sales Rule to create a national "do-not-call" registry. While these comments are directed at the FCC's proposal, it may also be instructive to review our prior submissions *to* the FTC, which provide relevant background information and help clarify our position on pertinent issues if questions arise in connection with this submission. ARDA appreciates the opportunity to comment upon the FCC's review of the TCPA and the proposal to create an additional national "do-not-call'' registry, as a substantial number of ARDA's members would be affected.

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ARDA summarizes our position on the various provisions in the Notice as follows:

Comments on Specific Questions.

In its NPRM, the FCC asked for comments on the following matters:

A. Current Practice of Company-Specific Do-not-call Lists

1. Overall effectiveness. ARDA member companies typically use third-party vendors to manage such lists, a practice that has proven very effective over time. While maintaining ever-increasing privacy standards on legacy systems is time-consuming and expensive, most of our members currently have systems in place to manage and maintain their in-house do-not-call lists at a reasonable level of error.

2. Balance of interests and burdens. Currently, both telemarketers and sellers who use telemarketers benefit from the practice of maintaining in-house, company specific lists of individuals who do not wish to be contacted by telephone. Sellers do not spend valuable resources on marketing to persons who they already know would (presumably) not be interested in their product, including those to whom the sellers have a special business relationship for any reason. The variety, complexity, and inconsistency of state lists has made compliance with many do-not-call regulations challenging, yet the current FCC scheme allows each telemarketer to manage its own lists as is most efficient, with the focus on the consumer's request. Additionally, under the current system, the consumer benefits at no cost - bearing only the burden of asking to have their number removed from each companies' list.

3. Ability of hearing/speech impaired to make the reauest. Currently, few of our members have the capability to market to TTD devices, and an individual consumer's ability to request to be placed on a company specific list will depend greatly on how the hearing/speech impaired person's telephone is set-up. Most telemarketers have a procedure for an agent or dialer *to* recognize the special tone *0f the* TTD telephone and terminate the call, marking the phone number as non-function and thus ineligible for future contact.

4. Lesitimate business or commercial speech interest promoted by hanq-ups.

   There is no legitimate business or commercial speech interest in intentionally dropping calls when a person answers the phone. In some cases, there is a legitimate interest in speaking with an actual consumer rather than leaving a live message. Thus, there may be hang-ups indicated on an answering machine. This is not a result wholly relegated to the telemarketing industry. Many private parties do not wish to leave a message for a variety of reasons.

   Hang-ups are an unfortunate and unintended consequence of the use of a predictive dialer. In order to meet reasonable economic efficiencies, some calls may connect but may not be picked up by an assigned telemarketer before the call is timed out or the consumer hangs up. Thus, a maximum error rate of 5% for such calls, as previously established by the Direct Marketing Association, may be appropriate.

5. Validity of specified advantases. ARDA believes that all of the advantages originally delineated by the FCC are still valid: Such lists are currently industry standards, and are not only maintained but have been finely honed through years of use. The use of company specific do-not-call lists allows a consumer to selectively opt-out of a given company's list, while continuing to obtain the kinds of information that each individual consumer wants, from sources each consumer wishes to access. The current practice allows each seller to obtain valuable information on consumer preferences, while at the same time protecting consumer confidentiality through company specific lists. Finally, the current practice imposes the entire cost of maintenance on sellers and not consumers. All these continue to be relevant and important advantages.

6. Relevance of the company-specific approach if FTC and/or FCC do-not-call lists are established. ARDA does not believe that consumers currently recognize the adverse impact that participating in any FTC/FCC list will have on their communications with vendors of goods and services that they utilize or may be interested in utilizing. The company-specific approach allows each consumer to make a choice based on the good or service or its provider, and prevents the consumer from inadvertently cutting themselves off from other companies with whom they regularly do business, or would wish to do business.

If a national do-not-call list is implemented, ARDA strongly advocates that it provide a means for the consumer to block only those calls it does *not* want – something that the TCPA currently handles in a very efficient manner. Further, any proposal to implement a do-not-call list should contain a clear exemption for calls relating to an existing business relationship, as more thoroughly discussed below.

7. Additional modifications to existing consumer registration requirements if company-specific approach is maintained. The current company-specific approach requires no consumer registration other than an affirmative statement to the telemarketer. Thus, the inclusion of additional requirements would create a greater burden on the consumer. ARDA strongly advocates that the consumer's choice to be included on any do-not-call list, whether company-specific or not, apply only to the particular company, brand, or subsidiary calling This would be consistent with the existing approach described in 47 CFR 64.1200, i.e. "In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised."

8. Confirmation of request to be placed on company-specific list. The requirement for a seller to provide a confirmation of each opt-out request to a confirmation list would add an additional significant cost burden on sellers. Some industry experts estimate as much as $1.00 for each notification, including printing, envelope, postage, processing, etc. Compliance with such a request is evidenced by the lack of future calls, not the mailing of a notice or confirmation.

9. Time-frame to process requests. ARDA believes that thirty days is not sufficient time to process opt-out requests in most cases. While an automated request can be processed electronically, lists which are pulled and sent to the call centers ahead of time (often as much as 3 to 4 weeks) would require a time-frame of 45 to 60 days to correctly process.

Additionally, from a practical standpoint, even immediate automated processing is problematic since the seller may be forced to use a "back-up" list in an emergency, such as when a computer system goes down. Such back-ups are generally refreshed at regular intervals (often every 30 days), but considering the timing of consumers submitting their telephone numbers, input and processing of the information into a computer system, and as much as 60 days could pass before accurate information was again available.

10. Reasonableness of ten-year inclusion on do-not-call list.

ARDA strongly believes that the requirement to include a name on any do-not-call list for ten years is unreasonably long. Consumers change their phone numbers on a frequent basis. This continuous turnover makes it more difficult to maintain an accurate list of consumers who do not wish to receive telemarketing calls, while at the same time preventing telemarketers from contacting interested potential customers. Second, consumers radically change their lifestyles and spending patterns in as few as 1 to 2 years, and may be interested in a variety of products and services that becomes available, even if they previously were not interested in hearing about those products and services.

In determining a reasonable time period a telephone number may remain on the registry before being renewed, the Commission should solicit information from various telephone service providers. The information should include at least the percentage of telephone numbers that are "turned over" annually. If the percentage is 20 percent or more, for example, the Commission should strongly consider limiting the period to no more than 1 year. However, if the turnover is a lower percentage, e.g. 2 percent, then the Commission may find no more than 2 years acceptable. In either case, any numbers on the list more than 2 years would most likely have turned over and the former subscribers, who placed their number on the registry, would likely have added their new phone number to the registry. This would needlessly limit the available customer base for sellers and forever bar telemarketers from contacting some otherwise viable phone numbers.

Additionally, near the end of the appointed time period, the subscriber should be required to affirmatively renew their listing for a fee. This would bring in revenue to offset the cost of maintenance and would effectively cleanse the list of outdated numbers.

Thus, if a number were reassigned to a new subscriber, there would at least be a limit on the time the number would be on the list. ARDA supposes that it would be unlikely that phone companies will be required to notify the Commission or any other governmental entity that a subscriber has changed their number and that the number should be removed from the list.

At a maximum, ARDA recommends that no request be honored for more than two years.

11. Desirability of possible Commission initiatives on current procedures to stop unwanted telemarketing.

ARDA is greatly concerned that the Commission would consider any public information "initiatives" related to any current or revised procedures. Any public relations initiatives would be perceived as an endorsement by the Commission of the procedures, which would, in effect, be a tacit condemnation of the telemarketing industry as a whole. ARDA considers such condemnation, whether in fact or perceived, as damaging to the industry and highly inappropriate.

12. Effectiveness of Direct Marketing Association (DMA) Telephone Preference Service.

ARDA members report that the DMA list is extremely effective, as it is consistently applied and efficient to utilize.

13. Safe harbors/Minimization of Burdens/ Established Business relationship.

Our combination of answers to the Commission is directly tied to the importance to our industry of maintaining a viable exemption for calls made to consumers with whom we have a "preexisting business relationship." ARDA strongly advocates the position that it is in both the consumer's and the seller's best interest to maintain the consumer's right to continue to hear from specific business vendors that she knows and wishes to do business with, notwithstanding a general determination by the customer that she does not want to hear from strangers (evidenced by registering for a do-not-call list). If a consumer falls within the "preexisting relationship" category, ARDA suggests that the burden shift from the vendor making the call to the customer, who must affirmatively tell the vendor "do not call" notwithstanding the prior placement of her name on a do-not-call list.

Existing customers come in a variety of sectors. Many are direct purchasers of products, such as a timeshare or mini-vacation purchaser; a renter at a resort, affiliated resort, or affiliated hotel; a customer utilizing a timeshare exchange right; a customer purchasing affiliated products at resort facilities such as a golf course; or a customer who attends a sales presentation but decides to purchase at a later time. Other existing customers participate in a strategic or personal relationship, such as a customer in a "frequent user" or other loyalty program; a customer of a parent or affiliated company; or any person whose contact information has been provided by an existing customer could be contacted once to determine if they have an interest in doing business with the company that their friend or family member is doing business. Finally, many may have made a customer-initiated contact, such as a registrant in a promotion or prize program; a consumer who requests information either directly or through a third party; a consumer who responds to a specific offer; or a consumer who accesses resources on the company website.

If a customer has agreed to allow a specific seller to contact him or her through their membership or account relationship in some form, then the seller should be able to contact that customer as long as their relationship is intact. Once the relationship has terminated, either at the customer's or the seller's direction, then a general no-contact instruction, such as the customer-specific do-not-call registry, may be applicable. Actually, at that point, it should be incumbent upon the customer to ask the seller to no longer call him or her, the current standard with the TCPA's requirement for company specific lists. Even if one of the parties terminates the relationship, which may have been based on a single product or service, the seller may offer other products or services the customer may wish to know about. If a customer desires to have no further dealings with the seller, he or she could simply ask the seller to place them on the company's do-not-call list. The former customer would then be treated as any other potential customer not possessing a special relationship with the seller. As the privacy concerns of the customer would be addressed in either instance, an exception from at least the coverage of the national do-not-call list would be reasonable.

If a national do-not-call list is established, an existing customer exemption would directly address any concern that the FCC's do-not-call rules would potentially violate the First Amendment to the U.S. Constitution, which protects commercial (business) speech, and the Commerce Clause of the U.S. Constitution, which protects interstate commerce from unreasonable legal burdens, and unreasonably burden business communications.

Additionally, there is a need to provide a "grandfather" exemption for limited period covering the circumstances where a company continue to call people that it has in their database who they have called before but who have not previously opted-out when the company contacted them previously – an implied opt-in. If a consumer is willing to consider our a seller's offers previously, and has not directed the seller to put them on a company-specific do-not-call list, it should be reasonable to assume that the seller they are open to consider offers again in the future.

B. Network Technologies

1. Development of technologies to block calls and cost limitations. ARDA believes that a variety of technological options currently exist that empower the consumer to block or screen incoming calls. The "Telezapper," caller-id and call block, and telephone answering services all allow the consumer to adequately manage incoming calls, when combined with a company-specific list.

Additionally, much of the focus of the Commission, the FTC, and the several states has been on the "front-end" issues of collection of data from consumers and dissemination of do-not-call data to telemarketers. While the Commission is focused on creating a single sign-up process for consumers, as well as a "one-stop shop" for telemarketers seeking do-not-call information., existence of less intrusive third-party and network-deployed solutions (such as Call Compliance's TeleBlock® platform Gryphon Networks database-oriented approach) enables compliance by all telemarketers at a centralized level, without necessarily incurring the costs and risks (from a data and privacy standpoint) associated with widespread dissemination of complex and voluminous data. A coherent national do-not-call policy must balance the protection of consumer privacy interests against constitutional mandates with regard to commercial free speech.

2. Transmission of name and phone number of calling party, when possible. ARDA agrees that telemarketers must be required to clearly identify themselves.

3. Prohibition on blocking or altering of caller ID information. ARDA agrees that telemarketers should be strictly prohibited from blocking or altering caller ID information.

C. Autodialers

1. Expand definition of "automatic telephone dialing system" by identifying other technologies. ARDA strongly advocates no change in the existing definition of "automatic telephone dialing system" found at 47 CFR 64.1200, " . . .the terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers."

2. Further restrictions on the use of predictive dialers, including requiring a maximum setting on number of abandoned calls or requiring use of dialers to transmit caller ID information. ARDA has supported reasonable limits on the number of dropped calls that are allowed during implementation of state guidelines, and would continue to support a reasonable and technologically supportable "error rate" determination. As stated previously, ARDA agrees that all telemarketing calls should transmit caller ID information.

3. Restrictions on the use of Answering Machine Detection (AMD) technology. ARDA would support reasonable restrictions designed to prevent abuses, so long as such restrictions do not interfere with legitimate commerce.

D. Identification Requirements

1. ARDA supports the concept that current rules could be modified to expressly require that all caller identification requirements apply to otherwise lawful artificial or prerecorded messages, as well as live calls.

2. As stated above, ARDA supports the concept that predictive dialers and other systems with the potential to abandon calls be expressly required to comply with all caller identification requirements.

E. Artificial or Prerecorded Voice Messages

1. Offers of free goods or services. Currently, offers of free goods or services related to our industry are heavily regulated by the Federal Trade Commission and the several states under a variety of regulatory schemes. ARDA suggests that any "information only" call is indistinguishable to the consumer from a regular telemarketing call – and is less intrusive since a call to an answering machine does no more than take up space on an electronic device and can be easily deleted. Further, the use of the prerecorded message as a vehicle to provide disclosures required during the live telemarketing call actually may be favored in some instances. ARDA would appreciate the Commission's flexibility in enforcement when considering the use of a prerecorded message in the calling process, to avoid dead-air and thereby assist consumers and telemarketers.

2. Calls that include information about a product or service but do not immediately solicit a purchase. As stated above, "information only" calls are indistinguishable to the consumer from a regular telemarketing call – and are less intrusive since they do no more than take up space on an electronic device and can be easily deleted.

3. Exemption of calls made jointly by nonprofit and for-profit organizations from restrictions on telephone solicitations and prerecorded messages. ARDA applauds the FCC's efforts to establish a level playing field in the commercial telemarketing arena. A rule under the TCPA which does not single out any specific type of business or exempt a group of industry's cures one of the major infirmities of the FTC's proposal. ARDA strongly suggests that no commercial parties should be exempted from the rules, regardless of their participation in some charitable program, if any part of the proceeds or profit from the calls inures to the benefit of the commercial caller.

4. Continued "existing business relationships exemption." As stated above, ARDA strongly agrees that an exemption *from* regulation *for* sellers to those with whom they have an "existing business relationship" (as defined by the Commission) continue to remain in effect in all aspects of any proposed revisions.

5. Interplay between EBR and customer's request not to receive calls. ARDA suggests that the Commission consider that a consumer does not intend to prohibit sellers with which the consumer wishes to do business from contacting the consumer. Any additional prohibitions, particularly the establishment of a national do-not-call list, should permit an existing business relationship to act prima facia evidence that *the* consumer does not wish that seller to be included in the prohibition established by the list, (i.e., on list before or after becoming relationship is established.)

F. Time of Day Restrictions

1. Effectiveness of current time restrictions on limiting objectionable solicitation calls. While the current provisions appear sufficient, they often conflict with state calling hours. This issue is exacerbated by differing time zones as national marketers attempt to comply with varying standards. Therefore, while a consistent time restriction makes sense in theory, it does not work well in the current regulatory environment. ARDA does not object to a single, consistent calling-time restriction applied evenly across the country.

2. Potential conflict between TSR and FCC rules if times altered. The potential for conflict between FCC and the FTC's telephone sales room is dramatic, especially considering the plethora of conflicting state regulations.

3. Interplay with a national DNC list. If the Commission established a national do-not-call list, the regulation of calling hours would be moot as it related to those consumers on the list.

G. Unsolicited Fax Advertisements

ARDA advocates continuance of the prohibition against unsolicited fax advertisements. The current definition of "prior express invitation or permission" has not been a source of confusion and does not appear to require amendment or clarification.

H. Wireless Telephone Numbers

Current level and nature of telemarketing to wireless consumers. Currently, ARDA members do not specifically target wireless consumers for marketing efforts, but wireless calls are undoubtedly made because a growing number of consumers use their cell phones as their primary phone number. The complexity of this issue is only going to increase with the advent of Local Number Portability in November of 2003. ARDA would not support restrictions based on the type of "receiving equipment" (except for fax transmission) lacking some significant technological solution that would minimize liability by efficiently eliminating such numbers from consideration. ARDA does not believe there is a need for any revision in the rules to address wireless calls at this time.

I. Enforcement

1 Clarification of consumer's ability to file suit after one violative call. ARDA believes that the current provisions of the TCPA that allow a consumer to press for enforcement after only one call would be overly restrictive if the Commission retreats from the company-specific list approach and moves instead to a national do-not-call list. If a national do-not-call list is implemented, ARDA suggests that a one-warning process that the consumer should be required to use for filing suit. Currently, phone numbers and lists are dynamic and cannot feasibly be updated daily. The technical difficulty of getting accurate updates more than quarterly makes immediate enforcement overly chilling on reasonable commercial activity.

2 Whether and to what extent state requirements should be preempted.
ARDA strongly recommends that any national do-not call list be designed to be comprehensive. Currently, there are over 26 individual state lists, and adding the burden of compliance with a national do-not-call list to such a plethora of conflicting regulations would make any telemarketing prohibitively expensive. ARDA strongly advocates that the Commission refrain from adding more confusion to this issue by retaining the current company-specific approach and refraining from adding any additional do-not-call-lists into the regulatory mix.

J. National DNC List

Would a national do-not-call list be less burdensome?

A single, one-step method for preventing calls would be less burdensome for telemarketers, However, there are now 27 competing lists and in the absence of total preemption, the imposition of an additional list (or possibly two lists) on a national level increases the burden, cost and complexity for both consumers and telemarketers. The ability to opt-out of a national do-not-call registry, while generally supported by our members, is certainly the focus of their greatest concern. They and other telemarketers are required not only to comply with the federal standards under the FTC's Telephone Sales Rule, and the requirements related to company-specific do-not-call lists pursuant to current Commission regulations, but also with the duplicative, inconsistent, varied, and often more restrictive state regulations. A do-not-call list at the national level, if not implemented correctly, could result in unwarranted economic and compliance burdens for our members.

The majority of ARDA's members rely on telemarketing as a low-cost means of contacting both current and prospective customers. However, the costs of compliance with additional regulations on the national level, unless offset to some extent, will decrease much of the economic benefit of this method without necessarily providing the desired results for those consumers who wish to receive fewer calls or no calls. ARDA members call both interstate and intrastate. The juxtaposition of the various states laws already causes difficulties in compliance, which has prompted members to seek assistance from outside companies to manage their do-not-call lists, thus incurring additional costs. ARDA recognizes the unique situation that a national do-not-call registry creates and offers some suggestions for integrating a national registry into the current regulatory scheme.

The current approach, regulating by a company-specific approach, is narrowly tailored to ensure that the burden of compliance on the telernarketer *is* no more extensive than necessary to serve the governmental interest, while a national do-not-call list broadly addresses the perceived harm.

ARDA's position is not that state law should yield to potentially less restrictive federal regulations, or that federal law should be more restrictive, inviting states to "up the ante" by increasing their current level of requirements. ARDA members, and presumably other companies that rely on telemarketing, support a standard for compliance that is consistent, uniform, and relatively easy to understand and comply with. If the a potential national do-not-call list meets these goals, it will save covered entities time and money , while allowing telephone subscribers the ease and security of a simple method for having their privacy wishes implemented. Further, to maximize the likelihood *of* compliance, revisions to the TCPA, particularly in relation to do-not-call issues, should not be unduly complex or trigger inadvertent violations.

The additional cost of another list, on top of the multitude of state lists, would be unbearable. There would be a disproportionate impact on smaller businesses – and the Commission should consider the potential impact on small business and its obligations to maintain fairness in regulatory enforcement on small businesses.

Absent uniformity in the collection and maintenance of numbers on a do-not-call registry (as an example of one area of telemarketing regulation), the national list loses some of its effectiveness in curbing unwanted telemarketing calls. Instead, it may allow many subscribers to slip through the web of laws for technical reasons and lead to unintended violations by telemarketers. Consistency, ease of compliance, and uniformity do not equate to preemption at the cost of well- intentioned state restrictions. A complete or partial preemption of state do-not-call laws, either as outlined above or in some other fashion, would, however, provide a viable means of reaching the goals of all concerned. Given this framework, an additional do-not-call list at the national level could result in unwarranted economic and compliance burdens for our members.

Conclusion

Once again, ARDA thanks the Commission for allowing it to participate in this very important rulemaking process. ARDA hopes that the Commission finds our comments helpful. Where ARDA has not been able to comment, ARDA asks that the Commission consider the specific data and relevant experience of other industry associations. We hope the Commission will consider these positions on the various issues as it integrates changes into the current Rule and permit further comment as necessary.

Sincerely,

Sandra Yartin DePoy
Vice President
Federal Affairs